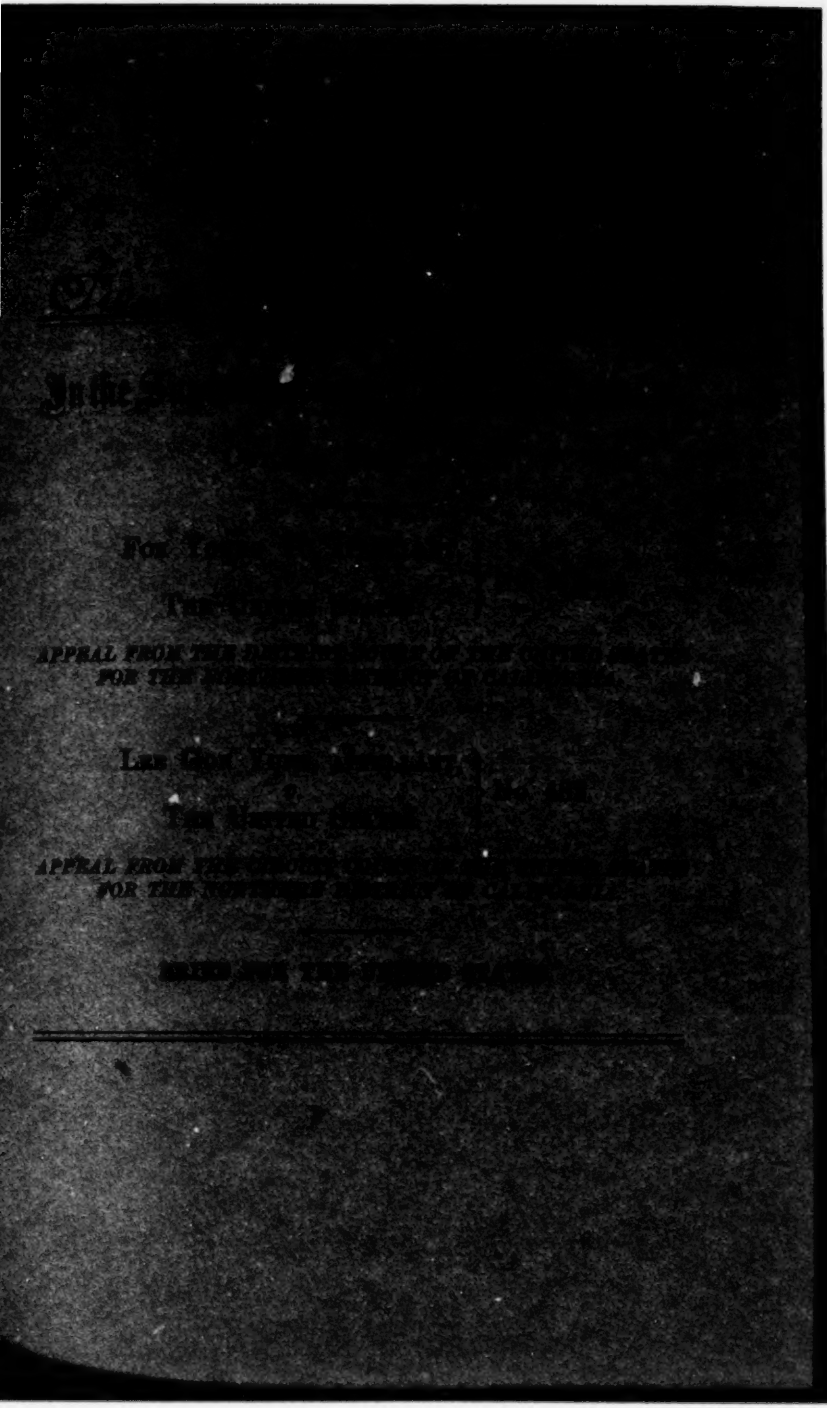

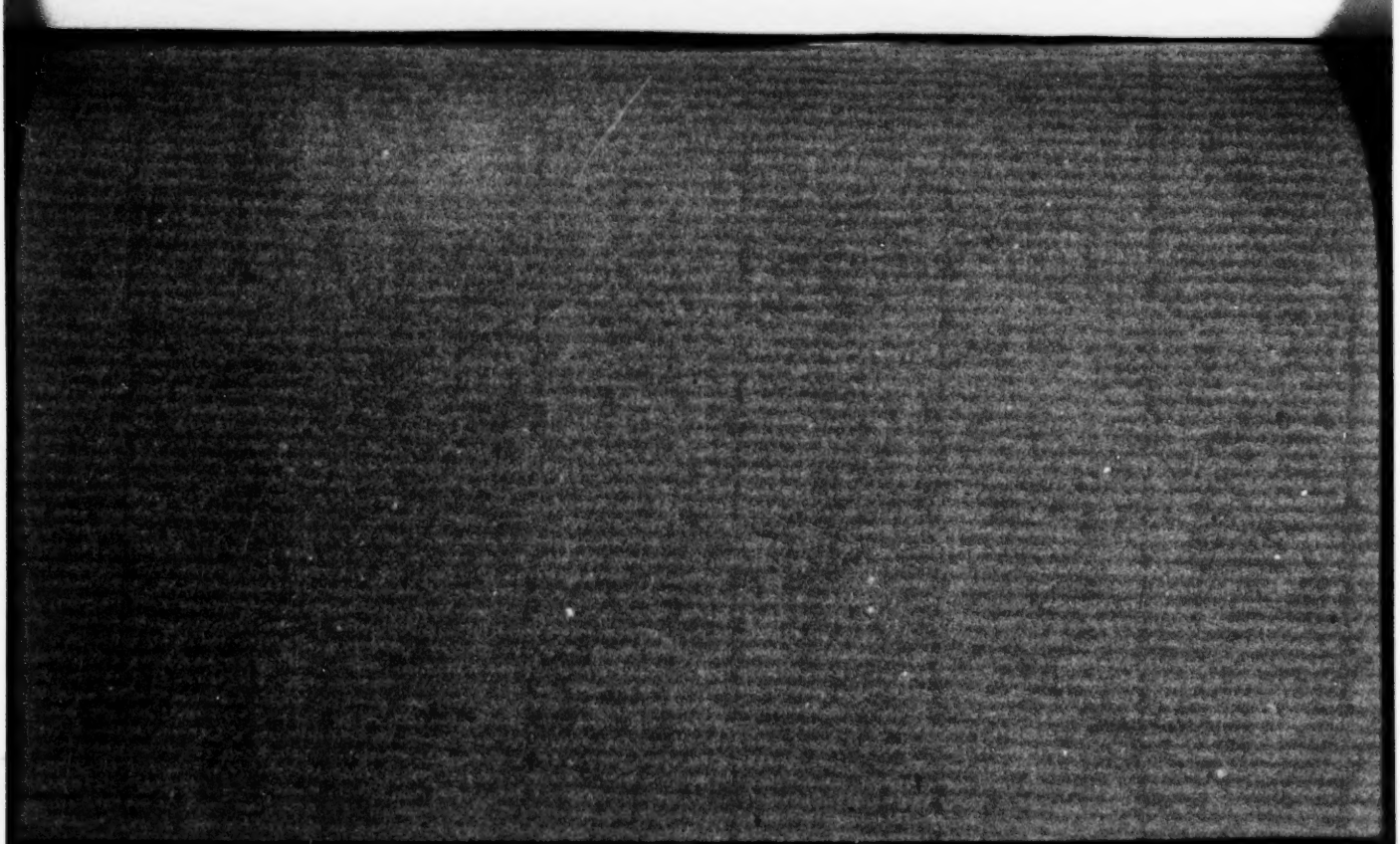

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FOK YOUNG YO, APPELLANT,
v.
THE UNITED STATES. } No. 478.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

LEE GON YUNG, APPELLANT,
v.
THE UNITED STATES. } No. 482.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are appeals from judgments of the lower courts discharging the writs and remanding the petitioners.

In the case of Fok Young Yo the application for the writ (Rec., pp. 1, 2) and the agreed statement of facts (pp. 7, 8) show that he is a Chinese subject who arrived at San Francisco by steamship, alleging an intention to go to San Jose de Guatemala, in Mexico,

for which place he had purchased a ticket at Hongkong, entitling him to passage to San Francisco and thence by sea to the said destination in Mexico. The collector of customs at San Francisco denied him the privilege of pursuing his journey to his alleged destination. The intervention on behalf of the United States (p. 6) states "that the collector of customs at the port of San Francisco, after careful and due investigation, has decided that he is satisfied that the said Chinese person does not intend, in good faith, to continue his voyage through the territory of the United States to the Republic of Mexico," for which reason the privilege of transit was denied.

In the case of Lee Gon Yung the application for the writ (pp. 1, 2) states that he is a Chinese subject, and purchased passage from Hongkong to the City of Mexico by steamship to San Francisco and thence by rail to his destination; that, after examination, the collector of customs at San Francisco refused the privilege of transit. In this case also the intervention of the United States (pp. 6, 7) alleges a careful and due investigation by the collector of customs. Demurrers were entered to the intervention filed on behalf of the United States and to the return to the writ (pp. 7, 8), which were overruled by the court (p. 9).

In both cases the intervention of the United States shows a finding by the customs authorities that the petitioners are laborers. In both cases the opinion of the court was that the decision of the collector of customs is not subject to review by the courts (Rec., No

478, p. 8; Rec., No. 482, p. 10). These appeals followed; the assignments of error (No. 478, p. 10; No. 482, p. 15) being based on these propositions:

That the treaty of 1894 does not authorize the Treasury Department to make regulations governing the privilege of transit, and that the Treasury regulation involved here is not valid; that the courts have jurisdiction upon habeas corpus proceedings, and may review the decision of the collector.

ARGUMENT.

I.

THE DEMURRERS IN NO. 482.

The demurrers to the intervention by the United States and to the return to the writ in No. 482 are not meritorious for two reasons—

(1) Because the right of the United States Government to appear and sustain the application of the treaty and regulations to such cases is fundamental and necessary. No other person, natural or artificial, is entitled or qualified to resist the admission into or transit across the United States of Chinese persons. The contrary view would mean that the hearing upon a writ of habeas corpus in such a case must be *ex parte*, and no defense of the Government's action and no presentation of its construction of the law could be heard.

(2) Because both demurrers are frivolous. The return to the writ (p. 5) alleges the order of the collector of customs as the ground of detention, and thus goes to the heart of the controversy. If the opinion

and judgment of the court, as based upon any of the fundamental contentions on the merits, are correct, these preliminary contentions may be ignored as futile, and, indeed, were probably interposed for purely formal reasons.

II.

THE MERITS; THE TREATIES AND UNDERLYING PRINCIPLES.

The case presented on the merits is just this: These men were seeking the privilege of transit through the United States on the allegation that they were *en route* to *bona fide* final destinations in foreign territory, in the one case by touching at San Francisco and transshipping to another vessel, which would carry the applicant through the port and coastal waters of the United States to a port on the west coast of Mexico, apparently near the boundary line of Guatemala; in the other case by rail transit through a portion of the United States on the way to the City of Mexico. There was due investigation in each case and a decision denying the application. Was the privilege of transit properly refused?

The treaty of 1880 (22 Stat., 826) contains no express stipulation on this subject. The language which declares that while the United States may regulate, limit, or suspend Chinese immigration, they may not absolutely prohibit, refers especially to the coming of Chinese laborers into the United States or their residence therein; that is to say, does not refer to the privilege of transit. The language by which rights and privileges of the most-favored nations are accorded to

Chinese subjects refers to Chinese of the permitted classes proceeding to and not through the United States, and to Chinese laborers who were then in the United States. The subsequent treaty and laws show as one of their main purposes that even this allowance to such Chinese persons to go and come of their own free will and accord has been much curtailed. So Article III of that treaty refers to Chinese persons who are either permanently or temporarily residing in the United States and does not refer to transit.

These observations are made because the treaty of 1894 (28 Stat., 1210) provides in Article III "that Chinese laborers shall *continue* to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused." The privilege thus recognized as continuing was one granted not by the previous treaty or laws, but by administrative recognition under regulations of the Treasury Department. Judge Morrow traces the evolution on the subject (No. 482, p. 13).

Looking back to the Burlingame treaty (16 Stat., 739), it is apparent that in this convention also there was no special reference to the privilege of transit. In Article V, in reprobating any other than voluntary emigration, the United States and the Emperor of China agree that man has an inherent right to change his home and allegiance, and that there is mutual advantage in the free migration of their respective citizens

and subjects from one country to the other for purposes of curiosity, trade, or as permanent residents. In Article VI there is a reciprocal agreement that citizens of either country, visiting or residing in the other, shall enjoy the privileges of the most-favored nations as to travel or residence.

As to the underlying principles of the law and comity of nations, Kent says (1 Kent Comm., 9th ed., p. 37):

> Every nation is bound in time of peace to grant a passage for lawful purposes over their lands, rivers, and seas to the people of other states whenever it can be permitted without inconvenience, and burdensome conditions ought not to be annexed to the transit of persons and property. If, however, any government deems the introduction of foreigners or their merchandise injurious to those interests of their own people, which they are at liberty to protect and promote, they are at liberty to withhold the indulgence. The entrance of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the government which tolerates it.

In a note to this passage (p. 38, note a) the learned chancellor thus comments on a foreign criticism of the restrictions abroad on the transit and sojourn of foreigners:

> But I am of opinion, notwithstanding, that every government has the right and is bound in duty to judge for itself how far the unlimited power of emigration and of the admission and

residence of strangers and immigrants may be consistent with its own local interests, institutions, and safety.

Even as to the peculiar right claimed *ex necessitate* by the United States to descend to the sea over navigable rivers entering the sea in foreign territory, as formerly in the case of the Mississippi and now down the St. Lawrence, Kent's view is that this right is doubtless one of imperfect obligation, but one that can not justly be withheld without good cause. (Id., p. 38.) Great Britain's contention in the early part of this century was that the right of passage was not an absolute natural right, but an imperfect right restricted to the right of transit for purposes of innocent utility, to be exclusively determined by the local sovereign. (Id., note *b*, p. 39; Wheaton's Elements of Int. Law, 3d ed., 248–257; Wheaton's History of the Law of Nations, pp. 506, 517.) This was the English view still in 1854, for by the reciprocity treaty of that year (10 Stat., 1089, Art. IV) an express grant of the privilege of passage over the St. Lawrence and connecting canals of Canada was made to citizens of the United States, and there was an explicit retention by Great Britain of the right to suspend this privilege on giving notice to the United States. On the larger claim of this Government, Kent says: "Mr. Wheaton in his Elements of International Law, 3d ed., 1842, very justly confined such a claim of dominion of the State to the seas and rivers *entirely inclosed within its limits.*" (1 Kent Comm., note *b*, pp. 39, 40; note 1, p. 40.)

It is true that by Articles XXVI, XXVII, and XXVIII of the treaty of 1871 with Great Britain (17 Stat., 863) reciprocal privileges of navigation on the St. Lawrence and other rivers and on the Great Lakes were granted forever or for a term of years, respectively. But the limitation of time in the one case and the restricted enjoyment as to the use of the Canadian canals in the other (Art. XXVII) merely emphasize the contention which we make that liberty of passage is not a general and perfect right in international law, but is a privilege only which requires recognition and agreement.

Calvo remarks (Le Droit International, Paris, 1896, Tome II, sec. 700) that every State is free to admit foreigners to its territory, or exclude them in case of necessity on motives of public order. *A fortiori* it is free to admit them only on certain conditions or under certain restrictions. Nevertheless the usage generally followed by governments permits in times of peace the entrance of foreigners to its territory, liberty of transit, of engaging in commerce, temporary sojourn, or settlement. But it is well understood that every individual who presents himself on foreign territory undertakes tacitly by that fact alone the obligation of submitting himself to the laws of the country which receives him, etc.

It is not necessary to point out Calvo's criticism, in passages of the context, of the national spirit and national codes which are hostile or burdensome to foreigners, nor his approval of the ethical progress by

which the spirit of strict reciprocity under conventions has been abandoned for the more enlightened notion of the voluntary admission of nationals and foreigners to a footing of equality as to civil rights and privileges. For it can not be doubted that our history and policy have in general realized the most enlightened views in this direction; and in the special case of the Chinese our policy of insistence on restriction and control is not only within our sovereign power, and has not only been deliberately adopted and maintained as necessary in the peculiar circumstances, but (it is to be remembered) our conduct toward China with respect to immigration and transit has been and is to-day far more liberal upon the whole situation than is that of China toward us. The balance of reciprocal rights and privileges shows beyond question that China receives far more than she grants. (Dissenting opinion of Mr. Justice Field in *Chew Heong* v. *United States*, **112** U. S., 536, 567–570.) We hear mainly one side of the case, namely, the situation here, and this obscures the extremely limited nature and extent of our rights and privileges in China. The greater part of her vast domain is absolutely shut to us, while a Chinaman who is entitled to any rights or privileges in the United States or their possessions, whether of entry or transit, may exercise his immunities (with few limitations) as fully in one portion of our national domain as another. Nor is it to be forgotten in this time of curious admiration for past philosophies that on the whole our instinct of protection is founded on

the justifiable conviction that our standards of life and conduct are safer for China than China's for us, and that China can not fairly complain until she has granted some approximation of mutuality (see remarks of Calvo as cited, Tome III, sec. 1304, p. 160, upon the interdiction of commerce by China and the barriers which she opposes to the expansion of civilization; memorandum of American Commissioners to negotiate treaty of 1880, Foreign Relations United States, 1881, pp. 171, 172); that if China treats "barbarians" in the spirit of ancient dynasties, the modern spirit, in the long run seeking to be fair and just, is not required to carry self-depreciation or abstract ideas to the point of Quixotic weakness, and in this matter of Chinese immigration and transit to impose no checks. Without complacently assuming that our checks are part of a providential compulsion, pointing out to China a better way, at least we may defend our own different standards and protect our national life from influences which the expression of the national will plainly declares to be dangerous; that is to say, it is evident, I think, in the broadest view of the inquiry, that we may take this course without offending against good morals or the most enlightened principles of international law.

Considering the opinion in the case of *Fong Yue Ting* v. *United States* (149 U. S., 698), and see *United States* v. *Lem Moon Sing* (158 U. S., 538) and *Chinese Exclusion Case* (130 U. S., 581, 609), there can be no doubt that this Government is firmly established on the doctrine that the power to exclude or expel aliens

is an essential attribute of sovereignty, which this nation possesses; that Congress is the sole judge of the wisdom, propriety, or necessity of the measures adopted; that even if the stipulations of a treaty should be disregarded in such measures, the treaty must yield to the later laws. If it is complained that there has been an infraction of treaty provisions, the remedy must be sought through international reclamation or negotiation; it is not a matter for judicial cognizance. (*Head Money Cases*, 112 U. S., 580; *Chew Heong* v. *United States*, id., 536, 562; *Whitney* v. *Robertson*, 124 U. S., 190; *Chinese Exclusion Case*, 130 U. S., 581, 600–603.) But here, we claim, the treaty explicitly authorizes the course pursued. It is clear that the privilege of transit accorded to aliens is subject to the same doctrines, and may be refused, or granted on terms, as we see fit to provide. Kent and Calvo show that this is no arbitrary rule of this nation, but the established law of nations. So that both solemn judgments of this court, and the declarations of that branch of law which sees international ethics unobscured by municipal laws, agree that the rules enacted by the United States on this subject are within our rights and competence as a sovereign nation.

The recent case of *Li Sing* v. *United States* (180 U. S., 486, 495), repeats the language used in the Fong Yue Ting decision, to the effect that the determination of the status of aliens within our jurisdiction is final with Congress, and that this court will not pass "upon the wisdom, policy, or justice of the measures

enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject."

To refer to Calvo again on two other points involved in this controversy: We contend that we are acting under and not contrary to the treaty in this case, and it requires no citation of authority to vindicate the high obligation of treaties, nor to show that Congress alone must determine when it is necessary to disregard the obligation. Calvo allows by inference that the repudiation of the obligations of a treaty may be demanded or justified under some circumstances, for he quotes from a message of President Arthur in vetoing a Chinese bill of the Forty-seventh Congress:

> A nation is justified in repudiating its treaty obligations only when they are in conflict with great paramount interests. Even then all possible reasonable means for modifying or changing those obligations by mutual agreement should be exhausted before resorting to the supreme right of refusal to comply with them. (Calvo, as cited, Tome III, sec. 1660, p. 399; see also message of President Arthur vetoing Senate bill No. 71, entitled "An act to execute certain treaty stipulations relating to Chinese," Cong. Rec., Forty-seventh Congress, first session, p. 2551.)

Referring to the most-favored-nation clauses of treaties, Calvo points out, especially in regard to ordinary treaties of commerce, that complete equality and absolute reciprocity under such clauses is very difficult to obtain, because of differences in the commercial, industrial, or social situation—"in manners and in the spirit

of economic legislation" (id., sec. 1597, pp. 365–6). This is not to say that such clauses are meaningless, but only that they are not definitely conclusive on construction.

Our diplomatic correspondence shows (2 Whart. Int. Law, pp. 456–477) that we acquiesce in the rigid surveillance of travel which is not yet much relaxed even among other western nations, and still less in China; and, accepting the serious burdens and embarrassments which result from foreign rules, exercise scrupulous care as to the issue of passports, and by refusing to support the claims of those who allege doubtful citizenship, or whose transit abroad is not *bona fide*, and is for such reasons obnoxious to a foreign government. Such transit is often interrupted by foreign refusals not only to admit to residence, but to grant the privilege of passage.

III.

THE PRACTICAL REASONS (IN GENERAL) FOR THE TREASURY RULES.

We do not seek to attach any unfavorable prepossessions to these records, but it will be proper to state the notorious experience of the Treasury Department in dealing with many such cases in order to explain the usual situation upon which such decisions are based.

The Chinese who transship at San Francisco for Mexican or Central American ports, or who pass by rail through the country on their way to West Indian ports or to a final destination in the interior of Mexico,

in many or most cases do not really know where they are going. They go in groups under a guidance or direction which disposes of them almost like animals. That is to say, notwithstanding alleged destinations and manifest lists, and even where they really go through to foreign territory, they are unshipped in batches at the first convenient port or station across the Mexican boundary. The border towns on the Mexican side are generally filled with large numbers of Chinese obviously waiting only for a favorable opportunity to enter this country. They do not seek work at these towns, and remain there idly in Chinese lodging houses and restaurants until a safe avenue of entrance to this country is opened. It is impossible to police effectively the entire stretch of that long frontier. The port of Ensenada in Lower California, about 40 miles below San Diego, was formerly a point where they disembarked in numbers, the border being conveniently near. Now Guaymas, inside the Gulf of California (with a direct railroad line to Nogales in Arizona), Mazatlan, and San Blas, farther down the Mexican coast, are the points where the sea transit often ends, whatever the asserted destination. While with Chihuahua, Saltillo, the City of Mexico, and other interior points as ostensible destinations, Chinese going by rail transit are unloaded at the first convenient station across the Mexican border, so that along the lines of travel, as at Eagle Pass, El Paso, and Nogales, there is a concentration, in the Mexican villages near the line, of Chinese awaiting an opportunity to enter this country. The Chinamen

themselves generally have no knowledge where they are going, and various unmistakable indications show that their only conception is that ultimately they will be landed in the United States by the various mysterious agencies who seem to guarantee this result.

This statement indicates the reason why the Treasury regulations provide for a strict scrutiny of identity, destination, and good faith to prevent the privilege of transit from being abused, as it undoubtedly is in many cases. I desire to repeat that I do not seek in any degree to impose such facts upon the records in these cases, but it seems proper to apprise the court in this statement, made only *arguendo*, of the usual situation and the general reasons for the Treasury rules and policy as reasonable and necessary.

IV.

THE PROVISION OF THE TREATY OF 1894; THE ACTS OF 1888 AND 1892; EXECUTIVE RULINGS.

Whatever the exact nature of the privilege of transit, or its origin here as applicable to Chinese laborers, the treaty of 1894 recognized it as continuing and as subject to such regulations by the Government of the United States as may be necessary; and this language can only mean such regulations as this Government finds necessary and accordingly imposes upon the conduct of the privilege. The regulations of December 8, 1900 (see appendix to Mr. Evarts's main brief), under which these men were refused the privilege, are more explicit and detailed than previous regulations, but are

not materially different. It is evident, as Judge Morrow points out in discussing the development of the regulations, that originally the privilege was recognized by regulations, without specific authority under the treaty then in force or existing laws. If the regulations were potent, without express authority, to permit Chinese laborers to pass through the country, notwithstanding the express provisions and the general policy of the exclusion enactments, then certainly, under a treaty which by necessary implication recognizes this origin of the privilege and its continuance under the previous regulations, and then expressly subjects the privilege to such regulations as may be necessary to prevent its being abused, there can be no valid doubt that this part of the law of the land authorizes the regulations which have been framed.

This is not a case of a treaty which is not operative without an act of Congress because it stipulates for the payment of money or because one of the powers engages to perform a particular act, which is addressed to the political and not the judicial department, and which the legislature must execute as a contract before it can become a rule for the courts. A treaty is the supreme law of the land, and is immediately operative where it deals with a subject finally and specifically, and the aid of Congress is not required to carry it into effect. (*Foster* v. *Neilson*, 2 Pet., 253; dissenting opinion of Justice Field, *Chow Hoong* v. *United States*, 112 U. S., 536, 562; 1 Whart. Int. Law, sec. 138; id., p. 73; opinion of Mr. Cush-

ing, 6 Op. Atty. Gen., 748.) A regulation made in pursuance of an act of Congress has the force of law (*Gratiot* v. *United States*, 4 How., 80; *United States* v. *Eliason*, 16 Pet., 291; *Ex parte Reed*, 100 U. S., 13; 22 Op. A. G., 568), and if made in pursuance of the provisions of a treaty should have equal force; for a treaty is the supreme law of the land and binds the courts as much as an act of Congress (authorities cited *ante*; *United States* v. *The Peggy*, 1 Cr., 103; *United States* v. *Rauscher*, 119 U. S., 407; *Whitney* v. *Robertson*, 124 U. S., 190; *Ex parte Cooper*, 143 U. S., 472).

Certainly it can not be said, under the language of the treaty of 1894, that an act of Congress could make clearer the right of the Government to impose regulations on this subject. Nor can it be said with any truth, when the purpose of the exclusion laws, the notorious shifts and evasions pursued, and the difficulty of meeting them are considered, that these regulations do not conform to the ordinary test of reasonableness. The authority of this Government to prescribe regulations, as granted or recognized in the treaty, is unqualified, and it can not justly be asserted that the Secretary of the Treasury has acted in an arbitrary manner or has adopted regulations which are unreasonable or absurd.

Further, section 8 of the act of September 13, 1888, gives the Secretary of the Treasury full authority to prescribe regulations, not only to protect Chinese persons provided for in certain articles of the treaty

with China then negotiated but never ratified, but also generally to "protect the United States against the coming *and transit* of persons not entitled to the benefit of the provisions of said articles." The classes protected seem to be Chinese persons of the permitted classes seeking to enter the country, and registered Chinese laborers seeking to return; and therefore "persons not entitled to the benefit of the articles" mean generally all other Chinese persons, and specifically, Chinese laborers seeking transit. That is to say, notwithstanding the failure of that treaty, here is a general authority to prescribe regulations respecting the classes of Chinamen who are not entitled to come to this country under existing laws and irrespective of the unratified treaty of 1888.

Now, it is true that there has been grave doubt as to what parts of the act of 1888 took effect, and whether *any* of its provisions are existing law. The lower Federal courts have generally held that the act became effective and is now law, excepting sections 1–4 and section 15 (see 2 Supp. R. S., 141, note). This court in the case of *Li Sing* v. *United States* (180 U. S., 486) decided that section 12 is not in force, although declining to say that there are no provisions in the act which from their nature are binding on the courts as existing statements of the legislative will. But the reason for this decision was that a different rule had been substituted by the later act of August 18, 1894 (id., p. 490). The Attorney-General has recently had occasion to advise the Secretary of the

Treasury that section 7 of the act of 1888 is not existing law, but mainly for the reason that its provisions have been substantially (but with slight variations) replaced by Article II of the treaty of 1894. (Opinion of October 10, 1901; see appendix to Mr. Evarts's main brief.) I submit that the authority given by section 8 to the Secretary of the Treasury to prescribe regulations on the subject of transit is one of the provisions of the act of 1888, which are most clearly not dependent upon the unratified treaty of that year, and therefore are to be regarded as valid existing law.

Section 5 of the act of 1888 seems to make it manifest that all the provisions of the act were not necessarily dependent upon the ratification of the treaty, for the language is, that after the passage of the act no Chinese laborer in the United States shall be permitted, after having left, to return thereto except under the conditions stated in the following sections.

Again, the act of May 5, 1892 (27 Stat., 25), which not only provided for the registration of resident Chinese laborers, but continued in force for ten years all the existing exclusion laws, provided in section 7 that "the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act." Although there was also explicit reference to the regulations covering the registration purpose of the act, the language quoted must be held to cover any purpose of the Chinese exclusion laws and to embrace the subject of the privilege of transit, which at that time was exercised solely under

regulations which the Treasury had prescribed, at first without express authority of law and later under the act of 1888.

Furthermore, the act of 1892, in its extension of existing laws, carried on all portions of the act of September 13, 1888, which were in force, including, as we contend, section 8 of the latter act authorizing regulations specifically upon transit, a matter which was conducted under previous regulations irrespective of any treaty, and, like the subject of section 5 of that act, was not dependent upon the unratified treaty.

It is an unwarrantable limitation of the act of 1892, considering its purpose, title, and general objects other than of registration, so to narrow the scope of the Secretary's authority in section 7 that his regulations may only cover the single feature of registering laborers.

Attorney-General Brewster, in an opinion dated July 18, 1882 (17 Op., 416), held that Chinese laborers desiring to return to their native land from other foreign lands may not be transported across the territory of the United States without a violation of the act of 1882.

> The enumeration in the statute of the cases in which Chinese laborers may be brought within the United States, notwithstanding the inhibition of the first section, must in my opinion be held to be exclusive of all other cases not enumerated. * * * This view of the statute is confirmed by the first article of the treaty with China, which gives the United States the

> right not only to regulate, suspend, or limit the residence of Chinese laborers in this country, but, furthermore, to regulate, suspend, or limit their coming here. As its title indicates, the act in question is pursuant to the treaty, and thus not obnoxious to the imputation of harshness or inhospitality toward a friendly power.

In a subsequent opinion, dated December 26, 1882 (id., 483), Mr. Brewster reversed that ruling, and held that the prohibition of the act of 1882 "applies to Chinese laborers coming into the country to stay as laborers;" that a Chinese laborer coming to this country merely to pass through it can not be considered as within the prohibition of the law; that therefore such Chinese persons are not required to produce the specified certificates of identification, provided they competently prove in some other manner their status as mere transient passengers. It is likely that on this change of view by Mr. Brewster the Treasury Department founded the early regulations permitting *bona fide* transits. (T. D., 5544.)

Mr. Garland (18 Op., 388) acquiesced in Mr. Brewster's later opinion, and, nevertheless, pointing out the ambiguity between the enacting clauses and the preamble of the act of 1882 as respectively determining Mr. Brewster's two opinions, indicated that it would be preferable for Congress affirmatively to clear up the ambiguity.

Mr. Brewster's later view was again approved in 19 Op., 369, while Mr. Olney (20 Op., 693) says: "In my judgment, and while there is room for difference of

opinion, Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States."

So that this cautious executive allowance in favor of Chinamen, where a strict construction of existing laws would have deprived them of the privilege of transit, has ripened into an express recognition under the treaty, upon a broad and explicit recognition, however, of regulations to prevent the privilege from being abused.

V.

THE FINALITY OF THE EXECUTIVE DECISION.

It can make no difference whatever whether the portion of the land or waters of the United States through which the transit is to be made is great or small. In one case the Chinaman, in touching at San Francisco for transshipment, enters our coast and port waters and actually lands, though but temporarily in intention, and on passing out of our jurisdiction to reach his destination he would again pass through the port and coast waters of the United States, no matter how narrow the fringe of our territorial waters which he enters and leaves. In other words, this is as much a transit through the United States as in the case of the rail journey to the City of Mexico.

It seems to be one of the chief complaints on behalf of the Chinamen in these cases that the regulations provide that the applicants "shall be required * * * to satisfy the said collector that a bona fide transit only is intended." I can perceive nothing unreason-

able nor unwarranted in this, either in view of the essence of the business or as a delegation of power to the Secretary under the treaty to frame such a regulation, or by the Secretary to a subordinate. It makes final the decision of the administrative officer who is in possession of all the facts, and who has the applicant before him, and this is merely in accordance with the deliberate policy of this Government in reference to immigration and many other subjects, as illustrated by the act of August 18, 1894 (28 Stat., 390), which makes the decision of the appropriate executive officer final if adverse to an alien's admission, unless reversed on appeal to the Secretary of the Treasury. It is always true that while the Secretary is not required he is empowered not only to modify this regulation as he may see fit, but to supervise in any particular case or in all cases the action of his subordinate, either by providing for a formal appeal, or otherwise, as he may determine. It is probable that many valid, practical reasons have operated to lead him to omit to provide in the regulations for review by himself of such cases on appeal. The only remedy in this situation (if there is or should be one) is by application to the power and discretion of the Secretary to modify the regulation generally by providing for an appeal or to hear the case and supervise the collector's action in any particular instance.

It is, I think, beyond question that this matter is one either of transit or admission. It is not likely,

perhaps, that the court will think that the temporary coming of such an alien to this country to touch and pass out by vessel or to pass through by rail is admission within the meaning of the act of 1894, just cited; but if it is, the proper jurisdiction and the finality of the decision, subject to the plainly limited right of appeal, are too clear to require further argument. While if the cases are exclusively instances of transit, as distinct from admission, then we are dealing with a *privilege* and not a *right*. The privilege is subject to the unqualified power of regulation by this Government to prevent abuse. It is well known, and is almost matter of judicial knowledge, that there are endless current abuses and many cases where there is no *bona fides* whatever. Due regulations have been made, and by these regulations the decision of the designated executive officer is made final.

It is unnecessary to recall to the minds of the court its well-settled judgments that where the final determination of facts is intrusted to an executive officer, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence under which he acted. This subject was elaborately examined and the authorities fully reviewed in the case of *Lem Moon Sing* v. *United States* (158 U. S., 538). The court in that case stated the petitioner's contention, viz, that while the immigration officers have jurisdiction to exclude an alien who is not entitled to come

into the United States, yet if he is entitled of right to enter the country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction, and the courts may intervene; and the opinion then proceeds to hold that "this view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States."

So here the authority to deal with transit, committed to the Secretary of the Treasury and his subordinates, drawn from the treaty and from the regulations prescribed thereunder, is as clear as the authority to exclude from admission under the act of 1894, construed by the court in the Lem Moon Sing case; and we may say with equal force that the contrary view, if sustained, would bring into the courts every case of a Chinese laborer who claims the privilege of transit through the United States under some law or treaty, but is prevented from exercising it by the executive branch of the Government. This view would defeat the manifest purpose of the law contained in the treaty, for the purpose of that law to commit this subject to executive regulation and determination is more

broadly expressed, but is quite as clear as the similar purpose in the act of August 18, 1894.

VI.

AS TO OPPOSING COUNSEL'S BRIEFS.

When the United States by the treaty of 1894 recognized the privilege of transit, they were careful to guard against its abuse by stipulating for regulations. It is misleading and futile, I think, to contend that we are not concerned with transit after it is finished, and have no right to do more than regulate so that the privilege shall not be abused by escape en route while within the jurisdiction of this country. The privilege is abused if there is an intention to make the transit merely for the purpose of convenient clandestine reentry, and the right of the Government to inquire as to *bona fides* before transit commences can not be denied. A regulation which directs refusal of the privilege when on careful investigation it appears that the applicant is not acting in good faith is valid, and is comprehended by the language of the treaty. May the law be so construed that the United States is unable to protect itself from this notorious clandestine influx after transit has been performed? It seems to me absurd to say that the opportunity for this fraud may not be denied at our threshold, even where the illegal intention is apparent or where *bona fides* is not shown, and where the illegal result has happened in numberless such cases.

It must not be forgotten, in view of counsel's contention that the power to regulate the manner of

transit does not include the power to prohibit transit, that transit is not only a mere privilege the abuse of which occurs after the transit has been performed, and that in a very small percentage of the total applications is the privilege refused, and then only after careful investigation, but that the privilege is especially conferred, with the safeguard expressed, upon *Chinese laborers*, and the first article of this very treaty is an absolute recognition of the right of the United States to prohibit, with narrow exceptions, the coming of Chinese laborers. That is to say, it is impossible not to admit that the allowance of transit to Chinese laborers keeps steadily in view the abuse of transit by which Chinese laborers who are prohibited from entering the United States nevertheless enter clandestinely. If the effect of the regulations to prevent the abuse of transit is to prohibit the coming of Chinese laborers into the United States, that result is clearly warranted by the main purpose of this treaty as well as of all the exclusion laws. It did not require the authority of the treaty to provide regulations intended to prevent the escape of Chinese in transit while they are within the United States, because the remedy then would be by arrest and deportation under other laws; but the intention and effect of the treaty is so to arm the Treasury Department that it has the power to exercise extraordinary precautions against the abuse of the privilege and the courtesy of the Government by means other than escapes within our territory—by frauds perpetrated and clandestine entrances made solely because

of the opportunity which a completed transit not made in good faith permits.

I have endeavored to meet the contention of counsel that the regulations are not valid without authorization from Congress. The act of 1882 is entitled "An act to execute certain treaty stipulations relating to Chinese," because the treaty of 1880 obviously required legislation to protect ourselves against unauthorized immigration of Chinese as well as to protect the Chinese entitled to come. But I repeat that where a treaty expressly provides, as this treaty does, for regulations, it is as effective in its authorization as an act of Congress.

Counsel appears to make some gratuitous assumptions on the facts in his assertions that the regulations in transit cases are not executed in a reasonable manner, but arbitrarily.

In the first place I note, in reply to a contrary assertion, that Fok Young Yo's own application states his destination to be the town of San Jose de Guatemala in Mexico, and not the country of Guatemala.

As stated above, a very small percentage of these transit applicants are refused the privilege. Their cases are carefully investigated and reported in full to the collector of customs, who then decides in person, and it is not mere assertion, but the sober fact, that scrupulous care is given to the investigation, consideration, and decision of each case. The Chinese inspector who examines these Chinamen does not deny them, arbitrarily or at all, the privilege of transit, whether to

Mexico, or Central America, or any other foreign country; he merely reports the case, with the facts he has obtained (in an orderly way, without harsh or unreasonable measures, and without arbitrary adverse inferences), to the collector of customs, with his recommendation. He does not act upon suspicion, and the learned counsel has no right to put into the inspector's mouth, as he does on pages 21 and 22 of his main brief, words implying that the inspector himself disposes of all such cases in a summary and unfair way, with pretty uniform prepossessions against the Chinaman, and upon the persistent suspicion that any such applicant has a fraudulent intention. Where the inspector is convinced upon abundant and sufficient evidence that the applicant has been in the United States before and desires and intends to return thereto, although not entitled, or, if not having been in the United States before, is not entitled to admission, and is making his transit to a foreign country only for the purpose of admission to the United States, he recommends to the collector that the privilege of transit should be refused on the ground of bad faith and abuse of the privilege; and if the collector acts in accordance with this recommendation, it is because he is personally convinced upon the facts and evidence submitted that the recommendation is just and proper and the privilege should be refused.

Nor is there any justification for counsel's inference that an application for the privilege of transit to England would be granted without equally careful

investigation, or where an application with Mexico as the destination would be denied. Here again counsel attributes to the Chinese inspector language which is not justified by any facts appearing in this record or in any other place. I desire to enter the Government's express and earnest denial of the facts stated and implied on all these matters in the opposing arguments. This kind of argument is carried to its extreme when counsel descants upon the probabilities of the case, and undertakes to explain the deliberate and careful decisions of the Government officers in such cases "by the general hatred of the Chinese in San Francisco, which has warped and perverted the judgment of the subordinate officials of the Chinese bureau there stationed." I remark again that such assumptions are wholly unwarranted and gratuitous.

Nor is it true, as I am informed by the Treasury Department, nor is it anywhere presented in evidence, that the Chinese inspector at San Francisco breaks open the baggage of applicants and subjects them to the indignity of a search of the person. They are required to show their credentials and any evidence which they possess as to their true purpose and their real destination, but there is no forcible proceeding whatever in conducting such investigations.

Since such liberties are taken with the record by the other side, I have no hesitation in saying that in numerous cases of this nature—sometimes in transits such as these, or in roundabout transits first from points outside of our territory, as from Halifax to Cuba and

thence through the United States ostensibly back to Canada—the Chinamen admit, sometimes in ignorance and sometimes because the fact can not be concealed, that their only desire and intention is to get into the United States. Such admissions go so far as to state that the purchase of passage tickets includes a guaranty of admission to this country, from what agencies or guarantors does not appear. In many cases Chinamen who have obtained the privilege of transit as alien laborers going to a foreign country apply for a writ of *habeas corpus* en route and seek to remain in the country as native-born citizens. The device of return after a completed transit is merely another shift which the favorable opportunities have developed. So that it will, I think, be evident to the court, from this general array of well-known facts, that such cases by no means show that the United States, through its officers, are harshly and unjustly refusing the right of passage to innocent foreigners, in contravention of the established principles of the law of nations and of our own treaties and other laws.

VII.

ADDITIONAL CONSIDERATIONS.

I have cited *ante* the veto of President Arthur on a Chinese bill of the Forty-seventh Congress. It seems that there were few differences between that measure and the act of 1882 passed and approved a month later, the chief one being that the bill vetoed made the period of suspended immigration twenty years instead of ten. President Hayes had vetoed a more

radical bill, known as "the fifteen-passenger bill." These vetoes reflected two objections of those days to such legislation. In the first place, it was thought that we could not justly restrict Chinese immigration until we had modified the Burlingame treaty, and commissioners were finally appointed, and the treaty of 1880 was the result of their negotiations.

Mr. Justice Field, in his dissenting opinion in the case of *Chew Heong* v. *United States* (112 U. S., 569), says that while he had formerly been of the opinion that the treaty of 1868 prevented restriction, he had modified his views because of the want of reciprocity in the benefits stipulated. The learned justice, in this case and in the Chinese Exclusion case in 130 U. S., p. 601, states the proposition that the obligations of a treaty may be properly abrogated or disregarded when the agreements of the other power are ignored or broken and cites authorities and precedents therefor. "So of any other mutual stipulations. When on one side they are not observed or become incapable of enforcement they cease to become binding on the other." (112 U. S., 570.)

It may be remarked in this connection that in the proceedings in Congress in 1882, as well as from the title of the act of 1882, it is evident that Congress, both before the features of previous measures objectionable to President Arthur had been eliminated and afterwards in the debate on the bill passed, repelled the suggestion or charge that by such legislation we were repudiating our treaty obligations.

The second objection referred to above, current at the time of President Arthur's veto, was that under the treaty of 1880 we might merely *suspend*, not prohibit, Chinese immigration, and that only for a comparatively brief period. Now, notwithstanding all the steps taken toward prohibition (which have been sustained by this court), it might have been said with truth, and may be said with more reason since the ratification of the treaty of 1894, that at all times some Chinese persons could enter this country, and to-day returning laborers may enter: so that not only is the absolute prohibition of the original entry of laborers, now assented to by China, strictly limited in time (Article I, treaty of 1894), but we are still only limiting, suspending, and regulating, not prohibiting, the coming or residence of laborers.

The case is similar as to transit. One of the objections on behalf of China to the legislation of 1882 was that there was no provision for transit (clause 5, memorandum of Chinese minister quoted by Mr. Sherman in the Senate; Congressional Record, vol. 13, pt. 3, p. 2610); not only so, but the language of sections 8 and 9 of the act of 1882 (sec. 8 being slightly amended in the act of 1884) might well be regarded as preventing transit, for those sections apply to all vessels and to any Chinese passengers, and the prohibition is generally against landing, and there is no mention of coming into the United States for a permanent residence or "admission" for that purpose. It is very clear, I think, that the privilege of

transit, which was continued by the treaty of 1894, was a privilege conceded, under a very doubtful condition of the law, by the executive regulations, which always undertook to limit, suspend, and regulate. At all times the regulations have required a *bona fide* transit (see clause 2 of Secretary Folger's regulations of 1883, T. D., 5544); and while certain evidence, like the production of a through ticket, has been permitted to be received as competent proof, the regulations are careful not to say that any item of competent proof is sufficient proof, and have plainly from the very first committed the passing upon the evidence and the decision to the executive officers.

Now, it seems to me most unreasonable and untenable to contend that the privilege of transit must be granted in *every* case; that our regulation must be limited to scrutiny and guard while the Chinaman is within our own territory; that otherwise we prohibit the privilege. It seems to me that the necessary and natural force of the word "regulations" as used in the treaty, even if we construe it by the requirement of the treaty of 1880 as to immigration—as permitting limitation, suspension, and regulation, but not prohibition—undoubtedly permits us, in order to prevent abuse, to deny the privilege to a few fraudulent applicants among a large number of applicants. It is certainly an extreme contention to say that we prohibit and do not regulate the privilege unless we grant it in every individual case.

The concession of the privilege is general to the Chinese nation; it is not a guarantee to every individual Chinese laborer who comes here for transit.

Nor may it be said with any force that a treaty which explicitly gives the power to regulate, in full view of preexisting executive regulations, as the only express foundation of the privilege, requires an act to effectuate the power. The act of 1882 was required in order to execute the treaty of 1880, and was called an act to execute treaty stipulations because there were stipulations for self-protection and for the protection of Chinese demanding legislative enactment; but an act to regulate or to authorize regulations is very different from an act to execute a treaty, and is certainly not required where the treaty itself gives precisely the same authority, and as explicit authority, as an act would give.

I respectfully submit that the judgments of the courts below should be affirmed.

HENRY M. HOYT,
Assistant Attorney-General.

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Nos 478 & 482.

App'x to Br. of U. S.

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In the Supreme Court of the United States.

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THE REGULATIONS ON THE SUBJECT CONSECUTIVELY STATED.

The regulations of May 19, 1882, Dept. No. 53, quoted the act just then passed and contained no separate specific provisions regarding transit.

The regulations of January 20, 1883, are shown in T. D. 5544, and are given in the appendix to Mr. Evarts's brief.

Secretary McCulloch's Chinese regulations of January 14, 1885 (T. D. 6722), given *in extenso* by Mr. Evarts, refer in the eighth paragraph alone to the matter of transit, show that merely touching here is transit, and subject that form of transit to the regulations of 1883.

Secretary Windom's regulations of 1889 (also quoted in Mr. Evarts's appendix) rescind previous regulations and were in force until the present regulations, dated December 8, 1900.

The form in which the regulations of 1889 were stated in the Treasury pamphlets ("Laws, treaty and regulations relating to the exclusion of Chinese") will be found on page 44 of the edition of 1899, and pages 45 and 46 of the edition of 1900. The present regulations of 1900 are also contained in Mr. Evarts's appendix.

It is only necessary to observe of this whole series of regulations that they all require a *bona fide* transit; that competent evidence may be received, and that the production of a through ticket is one item of competent proof and other evidence is contemplated. Certainly, in the investigation of this subject the Government may obtain and consider all other evidence, and is not restricted to that which the Chinaman may adduce in his own behalf.

RECORD OF TRANSIT APPLICATIONS AND REFUSALS.

Opposing counsel misconstrued the Government's statement about the number of transit applications and refusals. The statement was not that formerly there were many refusals and now there were fewer (upon

which counsel made a certain unfavorable inference), but just the reverse; namely, that formerly, when the abuse of transit was comparatively slight, substantially all the applications were granted, and that even now, when the evil has grown, and during the last record period of six months of the current year, there have been over 1,000 applications and less than 200 refusals. The Treasury Department records on this subject are thus summarized:

Between 1883 and 1901 there were 37,688 applications for transit granted and *none* were refused. These and the following figures refer to the port of San Francisco, where virtually all the transit cases come. It is known the privilege was abused in many cases included among this number. The evil grew and became apparent as the device most easily successful for Chinese laborers illegally seeking entrance to the United States. But even now, when under the evident abuse of the privilege the Government is scrutinizing and checking with the care required by the revised regulations, that is to say, during the last record period of six months of the year 1901, there have been 1,085 applications and 165 refusals. Nor is it accurate to say that there are just at present less refusals than there were a few months ago, because the Government is conscious of having gone too far; the case is quite the reverse. There are less refusals at the moment because the necessary lesson has been taught and the fraudulent applications have largely ceased. Surely the foregoing facts show regulation of the privilege to prevent abuse, and not prohibition.

THE QUESTION OF FINALITY, AND THE RECORD OF THE SECRETARY'S RECENT ACTION IN SUCH CASES.

It can not well be doubted that the present regulation commits the final decision on transit applications to the collector of customs; that is the intention and purpose as well as the result. There can be no question that such has been the practice, for the Secretary who framed the regulations so construes the matter and has so acted. The Government's understanding of the general principle is that there is no appeal in any such case as matter of right, unless the law expressly gives it. That is certainly the situation in respect to appeals in judicial proceedings; and so here or in any such case, where the law commits decision or action, evidently intended to be conclusive and final, to a designated executive authority, and does not expressly provide for the right of review or appeal, the decision of that authority is final.

We contend, of course, thoughout this case that the authority of the Secretary to frame the regulations is clear and ample. The Government does not deny the Secretary's *power* to provide for a review of the collector's decision by appeal to himself, nor his *power* to supervise in any less formal way the collector's action. But the Government does deny—and such is the Secretary's own view—that the Chinaman has the *right* of transit or the *right* to appeal. This leads to one of the questions put by the court as to what action the Secretary really took upon this point.

The Secretary, having before him the application on behalf of certain Chinese laborers for the privilege

of transit, including in effect the cases before the court (for Mr. Evarts says that they were recently brought before the Secretary), upon the 13th of November last referred to the Attorney-General for his opinion the question whether the right of appeal exists, making in his letter the following statement: "It has been held that neither the treaty nor the laws relating to the exclusion of Chinese, either expressly or by implication, give to Chinese persons refused the privilege of transit the *right of appeal*."

The Attorney-General, on November 15, declined to express an opinion upon the ground that the question was now before this court (in these very cases) for review, because "the point of the *right of appeal* to the Secretary of the Treasury is likely to be involved upon consideration of the proper jurisdiction in hearings before the Supreme Court."

Therefore it is evident that the Secretary has nowhere said that he was without *power* to review such cases, but has merely refused to recognize as a broad rule covering all cases the *right* of appeal which was claimed for Chinese laborers seeking transit. The Secretary therefore held to his previous view that no right of appeal existed, and that the regulations made the collector the final authority to determine in each case the question of permitting Chinese laborers to enjoy the privilege of transit.

As illustrating his own power to modify the regulations if deemed advisable and permit an appeal, or otherwise to supervise the action of his subordinate officer in any given case, I quote as follows from the

Secretary's letter of instructions to the collector of customs at San Francisco, dated November 18, 1901, in which the ruling that generally the collector of customs had final authority was announced:

> In looking over the appeals from your decisions recently transmitted, the Department is impressed with the apparent *bona fides* of the representations of certain of the appellants, particularly Nos. 44, 45, and 46, who claim to be destined to Panama; and, while it does not desire in any way to control your decision either as regards these or any other Chinese cases, yet it calls your attention to the fact that, as the last resort of Chinese seeking the privilege of transit, you should give such attention to cases of this character as will prevent any Chinese laborer who is honestly endeavoring to reach a final destination in foreign territory by passing through the United States, from being unjustly refused such privilege.

The issue here, however, is not upon the right of appeal in the case of "transits" *from the collector to the Secretary*, but *from the collector to the courts;* and it seems to the Government a singular contention, in enforcing the laws and the treaty for the exclusion of Chinese, that Chinese laborers claiming a mere *privilege* thereunder should have the right of recourse to the courts when that recourse is expressly denied by legislation to other persons who have certain *rights* under the same treaty and laws.

HENRY M. HOYT,
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